

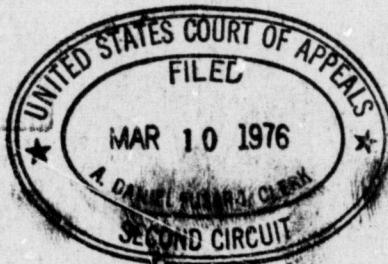
*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-6099 *3-10-76 R*

ONLY COPY AVAILABLE



APPENDEx

72 CIV. 193

S. HILTON BLACKSTONE, ETC., ET-AL

MOTLEY,

D. C. 2104 Rev. Civil Docket Continuation

DATE

PROCEEDINGS

Sept. 15-75 Filed Memo Endorsed..... The court has reviewed the within Affidavit of defendant Blackstone in opposition to plaintiff's motion filed 2-6-75 for partial summary judgment and concludes that defendant has not set forth a meritorious defense such as would justify setting aside the prior order of this court of 6018-75 granting partial summary judgment. The motion of defendant to set aside that order is therefore denied. So Ordered. MOTLEY, J.

CLERK'S OFFICE

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

(CBM)

HILTON BLACKSTONE, ETAL

Civil Action No.

72 CIV 193

Mr. U.S. Atty, Clerk, USCA

There was entered on the docket SEPTEMBER 15th, 1975

in order ~~CBM~~ (memo endorsed)

B.A.O. NO. 45

RAYMOND F. BURKHARDT

CLERK

Cont 7 Appeal
75-6099

TO BE ARGUED BY
MILTON BLACKSTONE
2 HOURS REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

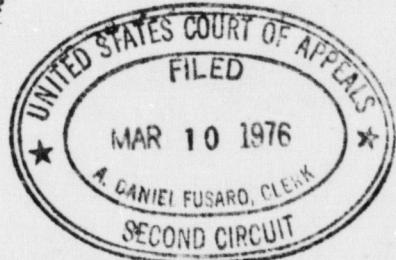
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UNITED STATES OF AMERICA,

Plaintiff-Respondent

-against-

MILTON BLACKSTONE, et al.

Defendant-Appellant



BRIEF FOR APPELLANT

Milton Blackstone
Pro Se
221 West 57th Street
New York, New York 10019

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Stipulations extending the defendant, Milton Blackstone's time to answer were agreed upon from time to time. The last stipulation appearing in the file is one dated November 28, 1972, extending his time to answer from October 11, 1972 to and including January 15, 1973.

Disposition of Case by District Court

On February 5, 1975, the United States made a motion for partial summary judgment against the defendant, Milton Blackstone. On March 20, 1975, prior to a determination of the motion, Helen Sperber, Esq., filed an affidavit with the Court, solely for the purpose of applying to extend Milton Blackstone's time to appear in opposition to the motion for summary judgment. The basis for this application was that the defendant, Milton Blackstone had been seriously ill. A doctor's certificate was attached to the affidavit (see Exhibit "C"). The defendant, Milton Blackstone could not and did not reply to the motion for partial summary judgment and on June 18, 1975, the Court granted partial summary judgment against Milton Blackstone.

Two weeks later defendant Blackstone learned about this judgment and communicated with the Court requesting

to be heard as his strength now permitted him to appear personally before the Court.

On July 11, 1975, the Court signed an order providing that if the defendant, Milton Blackstone, within thirty (30) days, presents to the Court, papers demonstrating that he has a meritorious defense to this matter, the Court would reconsider its denial of his motion to set aside the order granting partial summary judgment against him.

On August 11, 1975, Milton Blackstone filed an affidavit and various exhibits wherein it was claimed that the original tax assessments filed by the Internal Revenue Service were improper and that the professionals who consented to these obligations had no authority to do so.

On September 15, 1975, the Court held, without a hearing, that the defenses were not meritorious.

Thereafter, defendant Blackstone appealed on the basis that his constitutional right to a hearing or a trial were violated.

Statement of Facts

The following is an outline of the facts relating

to the liabilities of the defendant, Milton Blackstone for the various years in question.

A. FOR THE TAX YEAR 1958:

It is the Government's contention that the tax liability for the year 1958 resulted from the imposition of an assessment of \$20,244.78 on December 13, 1963, which assessment was reduced to \$14,171.35 in a consent decision entered in the Tax Court on December 10, 1965,

It is the contention of Milton Blackstone that this tax deficiency was obtained without his knowledge and consent and that those parties with whom the Internal Revenue Service dealt had no authority to represent him and consent to the entry of the said deficiency.

A review of the record will show that the original Notice of Deficiency dated December 13, 1963, was mailed to Milton Blackstone, c/o Victor Zelman, Esq., Suite 7021, 350 Fifth Avenue, New York, N.Y. 10001. At no time prior to that date had the defendant-appellant authorized the said Victor Zelman to act as his agent in connection with this proceeding. The tax return for the year 1958 listed the address of the taxpayer at 221 West 57th Street, New York,

New York 10019. All mail addressed to that address reaches the said taxpayer, even today. At no time did the Internal Revenue Service serve proper notice upon Milton Blackstone upon which this claim can be based. Annexed hereto as Exhibit "A" is a letter from Victor Zelman indicating his resignation as accountant for the various Blackstone entities.

Subsequent to the service of the deficiency upon Victor Zelman, a petition was filed in the United States Tax Court by Maurice Spanbock requesting that the deficiency be determined to be in a sum not in excess of \$2,742.63 for the year 1958. This petition is not verified by the taxpayer and nowhere in the file will there be found a power of attorney authorizing Maurice Spanbock to act on behalf of the taxpayer. A conversation with Mr. Spanbock on March 5, 1976, revealed that he has no recollection of filing a petition.

The records in this case do not show how and where Mr. Spanbock withdrew and how Isaac Okun entered the Tax Court Case Docket #97364. Here are the facts:

March 12, 1964- Motion by Maurice Spanbock to hold trial in New York.

June 1964- Answer by respondent.

November 8, 1964- Notice of trial in New York.

March 8, 1965- Hearing in New York; case continued generally; appearance of Peter M. Fass entered.

March 22, 1965- Motion of Maurice Spanbock to withdraw as Counsel of Record.

June 25, 1965- Motion of Peter M. Fass to withdraw as Counsel of Record.

November 8, 1965- Appearance of Isaac E. Okun- Entered.

December 10, 1965- Stipulated decision entered by Judge Raum.

It is the contention of the taxpayer that the said Isaac Okun who is listed on the said decision as counsel for petitioner, had no power, authority or right to represent him in the Tax Court.

B. FOR THE TAX YEARS 1959, 1961 and 1962:

It is the contention of the Government that for the years 1959, 1961 and 1962, Milton Blackstone executed form 872 extending the time within which assessments of taxes could be made to June 30, 1967 and within that time the taxpayer executed form 870 wherein he waived notice of deficiency prior to assessment and collection and consented

to the assessment and collection of a deficiency for the years 1959, 1961 and 1962 in the total sum of \$19,431.53, plus interest.

It is the contention of Milton Blackstone that the aforementioned deficiencies were the result of negotiations between the Internal Revenue Service and Isaac Okun who allegedly represented and had a Power of Attorney of the taxpayer to examine and report back to the taxpayer.

Subsequent to the assessment of \$19,431.53 it was discovered by defendant Blackstone that the years 1959 and 1961 had been closed out by examination with the Internal Revenue Service, by Victor Zelman, the preparer, without deficiencies. Mr. Zelman then turned the books and records over to David W. Katz & Co. Isaac Okun never had the books. (See Exhibit "E").

QUESTIONS PRESENTED

- I. DID THE COURT BELOW ABUSE ITS DISCRETION IN FAILING TO VACATE DEFAULT SUMMARY JUDGMENT WHEN PRESENTED WITH UNCONTROVERTED FACTS WHICH ESTABLISHED THAT DEFENDANT-BLACKSTONE, UNDER THE CIRCUMSTANCES, WAS UNABLE TO DEFEND AGAINST CLAIMS FOR TAX DEFICIENCIES?
- II. DID THE COURT BELOW DEPRIVE THE DEFENDANT-BLACKSTONE OF HIS CONSTITUTIONAL RIGHTS BECAUSE OF ITS REFUSAL TO VACATE THE DEFAULT JUDGMENT AND ALLOW HIM TO DEFEND THE ACTION ON THE MERITS?
- III. SHOULD THE INTERNAL REVENUE SERVICE BE ESTOPPED BECAUSE OF LACHES?

ARGUMENT

POINT I: TO DENY DEFENDANT BLACKSTONE THE OPPORTUNITY TO DEFEND THIS ACTION WOULD BE DEPRIVING HIM OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW AND THE RIGHT TO BE HEARD ON THE ISSUE OF HIS INDEBTEDNESS AND THE RESPONDENT WILL BE RELIEVED OF THE BURDEN OF PROOF TO ESTABLISH THE VALIDITY OF THE ASSESSMENT

It is the contention of Milton Blackstone that, if given the opportunity, he would be able to prove that he has a valid and meritorious defense to the claims of the Government for income taxes imposed for the years 1958, 1959, 1961 and 1962.

As can be seen from the papers on file in this matter, and particularly Paragraph 9 of the Affidavit of Samuel J. Wilson, Assistant United States Attorney, in support of the plaintiff's motion for summary judgment, and the March 12, 1975 medical certificate of Dr. William M. Hitzig (Exhibit "C" annexed hereto) attached to the affidavit of Helen Sperber, the defendant taxpayer, Milton Blackstone has been suffering from disability that precluded him from properly defending this action. Defendant Blackstone now, although 70 years of age, has completely recovered and is in the position to actively pursue this matter.

Under the Fifth Amendment of the Constitution of the United States, it is provided:

"No person shall be deprived of life, liberty, or property, without due process of law;"

To preclude Milton Blackstone from interposing an answer in this matter, conducting all of the discovery and other proceedings available to him, would deprive him of his property without due process of law and arbitrarily grant the Internal Revenue Service a wind-fall of tax obligations assessed against the defendant without proof of their validity, on the basis of a default judgment, which, under the law and the facts and circumstances of this case, in the interest of justice and equitable principals, according to the concepts of American Jurisprudence, should have been vacated by the Court below.

POINT II: PLAINTIFF SHOULD BE ESTOPPED FROM PROSECUTING THIS ACTION BECAUSE OF LACHES

If given the opportunity to file an Answer to the Complaint, the defendant, Milton Blackstone would allege as an Affirmative Defense that the plaintiff should be estopped from the prosecution of this action because of laches.

As set forth in the Statement of the Case, this action is to recover taxes for the years 1958, 1959, 1961 and 1962; the tax assessments were first filed against the defendant, Milton Blackstone on January 14, 1966. The action to reduce the assessment to judgment was not commenced until January 14, 1972, the last day that any action could be brought. Between 1966 and 1972, the plaintiff took no action to collect or enforce the assessments filed against the defendant, Milton Blackstone with the exception of certain questioning that took place in March of 1968, resulting in the levy on a bank account maintained by the defendant Blackstone at the Marine Midland Bank (see Exhibit "D"). Between 1968 and January 14, 1972 no affirmative action was taken.

If the plaintiff had brought this action within a reasonable time the defenses as hereinafter set forth could have been substantiated by testimony and records on file. Since the commencement of this action the defendant has learned that Isaac Okun, who was alleged to have had the defendant's Power of Attorney, has died. The United States Tax Court, whose decision is the basis for the 1958 tax assessment, has disposed all of its records relating to this case and various other witnesses and records that would have been available to the defendant, Milton Blackstone have disappeared.

Based upon the foregoing, it is the contention of the defendant, Milton Blackstone that the plaintiff should be bared from proceeding with this action because of laches.

As defined by Black's Law Dictionary "laches" is principally a question of inequity of permitting a claim to be enforced. It is an inequity founded on some change in the condition or relations of the property or the parties. It is based on delay attended by or inducing a change of condition or relation, a delay such as to preclude the court from arriving at a safe conclusion as to truth, a delay that works or results in disadvantage, injury, injustice,

detiment or prejudice. It is further defined as a failure to prosecute a claim within a reasonable and proper period, a lack of diligence on the part of the plaintiff to the injury, prejudice or disadvantage of the defendant, and a lapse of time together with a change in the condition or relation of the parties.

The instant case fits clearly into all of the above definitions. The unreasonable delay of the Internal Revenue Service in prosecuting this action has placed the defendant, Milton Blackstone at a distinct disadvantage in that;

(i) all of the records of the Tax Court have been discarded with the exception of the final decision;

(ii) the various professionals representing the defendant, Milton Blackstone have either retired or died;

(iii) the various records in the possession of the professionals representing the defendant, Milton Blackstone have been discarded or lost.

Based upon the foregoing, it is the contention of the defendant, Milton Blackstone that the Government should be barred from bringing this action because of laches.

POINT III: DEFENDANT HAS A MERITORIOUS DEFENSE TO
THIS ACTION

If the defendant, Milton Blackstone would have been given the opportunity to file his Answer and conduct the discovery proceedings available to him, he would be able to prove the following:

- (i) that the deficiency notice for the year 1958 was not sent to the taxpayer by registered or certified mail pursuant to Section 6212 of the Internal Revenue Code of 1954
- (ii) Victor Zelman, the party to whom notice was sent, did not have power of attorney
- (iii) that Maurice Spanbock the attorney who filed the petition in the Tax Court, was not properly authorized to do so
- (iv) that the petition in the Tax Court was not verified as required by the then existing rules of practice of the United States Tax Court.
- (v) that Isaac Okun was not authorized to represent Milton Blackstone individually in the Tax Court Proceeding.

(vi) that the form 870 relating to the tax deficiencies for the years 1959, 1961 and 1962 were obtained from Milton Blackstone by deception.

In the case of Gregory v. United States, 57 F. Supp. 962 it was held that a notice not properly addressed is of no legal efficacy as notice. In the instant case, the notice addressed to the taxpayer c/o Victor Zelman was not properly addressed.

The defendant Blackstone has not been in the position to respond adequately to the requirements of the Court because of his illness and lack of funds. The Internal Revenue Service knew that he was virtually penniless. Through the appreciated, now available assistance of his brother, Daniel Blackstone, who has come to his rescue, he is now able to fully meet the engagements of this proceeding.

Annexed as Exhibits "B-I through B-VIII" are a series of eight (8) pages that graphically spell out the course of events, starting with the notice of deficiency; all proceedings in the Tax Court; the Internal Revenue Services' bill arising from these proceedings; the tax lien filed in 1966; and refiled in 1972. With the additional four years to the present time, there is a span of thirteen years

relating to the alleged tax liability for the year 1958.

The first document dated December 13, 1963, the notice of deficiency, was never properly served on the taxpayer. Since that document must fail---the entire proceeding must be voided.

POINT IV: UNDER THE UNITED STATES CONSTITUTION
DEFENDANT MILTON BLACKSTONE IS
ENTITLED TO A TRIAL BY JURY

If issues of fact can be shown, it is the contention of the defendant Milton Blackstone, that the Seventh Amendment of the Constitution of the United States insures his right to a trial by jury. The said amendment provides as follows:

"Civil Trials

In Suits at common law, where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court, of the United States, then according to Rules of the Common Law."

It is the contention of the defendant Milton Blackstone that the granting of summary judgment and the refusal of the Court to allow him to interpose an answer is a violation of the Seventh Amendment of the Constitution of the United States.

It is the further contention of Milton Blackstone that under the equal protection amendment of the Constitution he has not been afforded an opportunity equal to the Internal Revenue Service, before this Court.

POINT V: THE GOVERNMENT HAS THE BURDEN OF PROVING THE VALIDITY OF THE TAX ASSESSMENTS

It is the contention of the Government that the assessments resulting from the tax court proceeding is res judicata and cannot be re-examined in this action. It is their further contention that they have met the burden of proving the remaining tax liabilities by introducing the assessment and deficiencies in their file.

It is the contention of the defendant, Milton Blackstone that an examination of the complete file and certain additional information that he will only be able to obtain by discovery will prove by a fair preponderance of the evidence that the assessments are erroneous.

The res judicata doctrine arises from the amendment in the Constitution which states that no fact tried by a jury shall be re-examined in any other Court, except by the rules of the common law. The facts in this matter have not been tried by a jury but have never even been heard. Therefore the doctrine of res judicata will not apply.

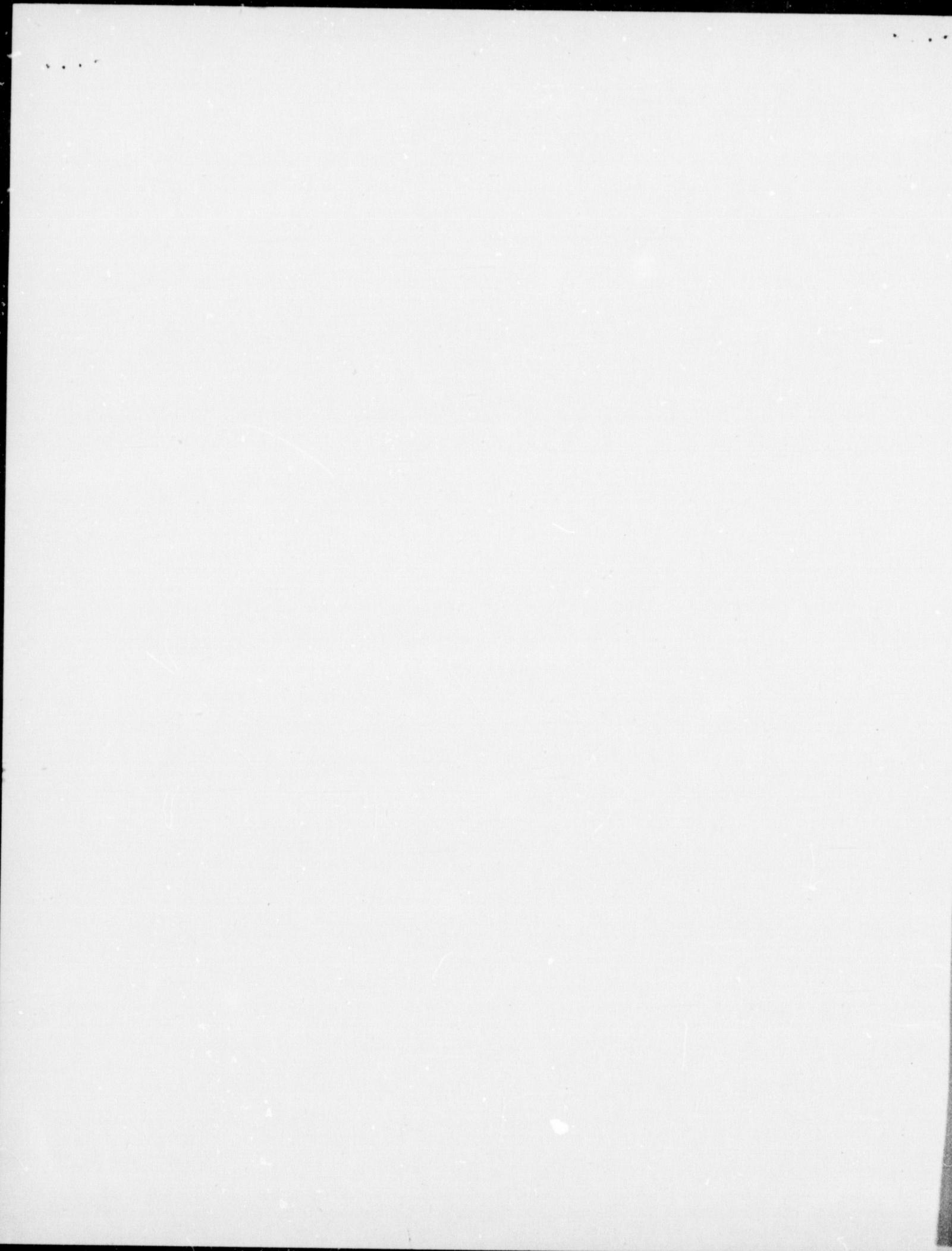
CONCLUSION

The complaint should be dismissed or in the alternative the defendant Milton Blackstone should be given a reasonable time within which to file and serve an answer to the complaint and litigate the issues on the merits.

If the Internal Revenue Service can prove, in spite of the foregoing, that Milton Blackstone has tax liabilities for the years in question, these will be paid from assets which can be established. On the other hand if the Internal Revenue Service owes Milton Blackstone refunds for any year between 1958 to present, he would like this Court, by appropriate process, to enforce this payment.

Respectfully submitted,

Milton Blackstone
Pro Se



Robert B. Fiske, Jr. (RL)

COPY RECEIVED
March 10, 1976
UNITED STATES ATTORNEY